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## A Bridge Too Far?: The Need for a Hard Look at South Carolina's New Coastal Island Regulations

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Harper: A Bridge Too Far?: The Need for a Hard Look at South Carolina's N  
**A BRIDGE TOO FAR? THE NEED FOR A HARD LOOK**  
**AT SOUTH CAROLINA'S NEW COASTAL ISLAND REGULATIONS**

I. INTRODUCTION

In 2005, the South Carolina Supreme Court invalidated a state regulation regarding the granting of permits to construct bridges to small marsh islands in *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*.<sup>1</sup> While the regulation expressly applied to “access to small marsh islands,” the court found it was void due to vagueness because it failed to define what constituted a small island.<sup>2</sup> As a result, the court held the general transportation regulations that are part of the coastal regulatory schemes for tideland and coastal projects<sup>3</sup> governed the bridge construction permitting process.<sup>4</sup>

In response to the invalidation of the access-to-small-islands regulations (small island regulations), the South Carolina Department of Health and Environmental Control (DHEC), through its Office of Ocean and Coastal Resource Management (OCRM), promulgated new regulations. At the direction of the DHEC Board, OCRM created an advisory stakeholder committee<sup>5</sup> composed of interested parties to develop a new permitting process for bridge construction to coastal islands.<sup>6</sup> While the South Carolina General Assembly approved only a portion of the recommended regulations,<sup>7</sup> the new regulations for access to coastal islands (coastal island regulations) represent a complete reworking of the bridge permitting process rather than simply the inclusion of a definition for small islands. Where the old small island regulations listed eleven factors for determining if OCRM should issue a permit to construct a bridge to “a small island,”<sup>8</sup> the new coastal island regulations set bright-line size and distance limitations.<sup>9</sup>

Thus, the potential ramifications of the new coastal island regulations are far reaching. The coastal island regulations restrict the number of islands eligible to apply for bridge construction permits, limiting the number of coastal islands that

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1. 363 S.C. 67, 75, 610 S.E.2d 482 (2005); S.C. CODE ANN. REGS. 30-12(N) (Supp. 2004), *invalidated by* S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control, 363 S.C. at 75, 610 S.E.2d at 486.

2. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486.

3. S.C. CODE ANN. REGS. 30-12(F) (Supp. 2004).

4. *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486.

5. Statement of Situation Requiring Immediate Promulgation of Regulatory Amendments Regarding Access to Coastal Islands, 29 S.C. Reg. 104, 105 (Oct. 28, 2005).

6. S.C. CODE ANN. REGS. 30-12(N) (2006).

7. *See* S.C. CODE ANN. REGS. 30-12(N) (Supp. 2006); *see also* 30 S.C. Reg. 167 (June 23, 2006).

8. S.C. CODE ANN. REGS. 30-12(N) (Supp. 2004).

9. *See* S.C. CODE ANN. REGS. 30-12(N)(2) (Supp. 2006).

can be developed in the future.<sup>10</sup> Thus, members of the environmental community worry that the regulations are arbitrary and fail to provide adequate protection to some ecologically sensitive areas.<sup>11</sup>

Part II of this Comment provides an overview of the South Carolina Supreme Court's decision in *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*. Part III reviews the small island regulations invalidated in *S.C. Coastal Conservation League* and describes the new coastal island regulations. Part IV outlines the historical development and benefits of aggressive judicial review of agency decision-making under the hard look doctrine. This part argues that South Carolina courts should adopt a similar standard of review. Finally, Part V analyzes the creation and implementation of the coastal island regulations through the lens of the hard look doctrine and concludes that a court applying hard look review would determine that the coastal islands regulations should be remanded to DHEC because they were not the result of reasoned decision-making based on all relevant facts, but instead represent an arbitrary and capricious rule formulated with inadequate information. Part VI concludes.

## II. AN OVERVIEW OF THE SOUTH CAROLINA SUPREME COURT'S DECISION IN *S.C. COASTAL CONSERVATION LEAGUE*

In *S.C. Coastal Conservation League*, LandTech, a Charleston corporation, applied to OCRM for a permit to construct a bridge across the Wando River marshes.<sup>12</sup> LandTech wanted to construct the bridge across the marshes as part of its development plan for Park Island.<sup>13</sup> After reviewing the application, OCRM determined that Park Island was a small island and that the permit application must be analyzed under the small island regulations.<sup>14</sup> LandTech disagreed with OCRM's determination that Park Island was a small island and argued the more general transportation regulations should apply to the permitting process.<sup>15</sup> Although OCRM disagreed that the transportation regulations should apply to the Park Island bridge permit, OCRM determined that the permit application met the criteria of the more stringent small island regulations and granted a bridge construction permit to LandTech.<sup>16</sup>

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10. See *infra* notes 60–64 and accompanying text.

11. See *infra* notes 162–63 and accompanying text; see also E-mail from James S. Chandler, Jr., S.C. Envtl. Law Project, to Carolyn Boltin, Deputy Comm'r of the S.C. Dep't of Health and Envtl. Control, Office of Coastal Res. Mgmt. (April 4, 2006, 2:01:24 PM EST) (stating that, without including "performance standards," the regulations do not adequately minimize environmental impacts of island development).

12. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control* 363 S.C. 67, 70, 610 S.E.2d 482, 484 (2005).

13. See *id.*

14. *Id.* at 70–71, 610 S.E.2d at 484.

15. *Id.* at 71, 610 S.E.2d at 484.

16. *Id.*

The South Carolina Coastal Conservation League (Coastal Conservation League) objected to OCRM granting the permit and appealed the decision before the Administrative Law Judge Division (ALJD).<sup>17</sup> The Coastal Conservation League, while agreeing with OCRM that the small island regulations applied to LandTech's permit application, argued that LandTech's application did not satisfy the regulatory criteria in the small island regulations. Therefore, the Coastal Conservation League argued that OCRM improperly granted the Park Island permit.<sup>18</sup> Throughout these proceedings, LandTech continued to object to the OCRM determination that Park Island was a small island.<sup>19</sup>

In the subsequent administrative hearing, the administrative law judge (ALJ) agreed with LandTech and held that the transportation regulations were the appropriate set of rules for evaluating the Park Island permit application.<sup>20</sup> During the proceedings, the ALJ noted that the regulations failed to define "small island" and that OCRM needed specific criteria in order to objectively determine when the small island regulations applied.<sup>21</sup> In an effort to create objective criteria, the ALJ compared the size of Park Island with other islands in the Wando River Basin.<sup>22</sup> The ALJ did not, however, consider the size of Park Island in relation to other islands in different river basins.<sup>23</sup> The comparison led the ALJ to determine that Park Island was not a small island because it was larger than 80% of the islands in the Wando River Basin.<sup>24</sup> As a result, the ALJ held the general transportation regulations applied to the Park Island bridge construction permit.<sup>25</sup>

Despite finding that Park Island was not a small island, the ALJ reviewed the OCRM determination that the permit conformed to the small island regulations.<sup>26</sup> The ALJ found that, even if Park Island qualified as a small island, all eleven factors contained in the Small Island Regulations pointed to granting the permit. Under either regulation, therefore, OCRM properly granted the bridge construction permit.<sup>27</sup>

The Coastal Conservation League appealed the ALJ's determination to the OCRM Coastal Zone Management Appellate Panel<sup>28</sup> which affirmed the

17. *Id.* While the Coastal Conservation League was not a real party in interest because it did not have a personal stake in the Park Island bridge permit application, courts may grant environmental groups standing to challenge agency determinations when the group asserts a recognizable injury to the interest of its members. *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988).

18. *S.C. Coastal Conservation League*, 363 S.C. at 71, 610 S.E.2d at 484.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. The Coastal Zone Management Appellate Panel is created by statute and is charged with advising DHEC. S.C. CODE ANN. § 48-39-40 (Supp. 2006).

decision of the ALJ without analysis.<sup>29</sup> On appeal of the panel's decision, the circuit court overturned the ALJ determination that Park Island was a small island, finding the ALJ erroneously used a test that was not established by regulation.<sup>30</sup> In the absence of objective criteria, the circuit court deferred to the OCRM determination that Park Island was a small island.<sup>31</sup> In addition, the circuit court overturned the ALJ's determination that the issuance of the permit was proper, finding that the issuance of the permit did not conform to the more stringent criteria set forth in the small island regulations.<sup>32</sup> As a result, the circuit court vacated the granting of the Park Island permit, prompting LandTech to appeal to the South Carolina Supreme Court.<sup>33</sup>

On appeal, the South Carolina Supreme Court held that the small island regulations were void due to vagueness because they expressly apply to small islands but fail to promulgate a "test to determine whether an island is small."<sup>34</sup> The court also determined that in the absence of any particularized regulation, the more general transportation regulations applied to LandTech's Park Island permit application. The court held that because OCRM was the sole administrative entity with rule making power and OCRM did not include a test in the regulations, the test used by the ALJ was improper.<sup>35</sup> Similarly, the court held the circuit court's decision deferring to OCRM was improper because the regulation impermissibly granted unguided discretion to OCRM in determining when the small island regulations applied.<sup>36</sup> The court ruled that, in such cases, the appropriate action is to "defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."<sup>37</sup> The court, therefore, deferred to the decision resulting from the OCRM adjudication by the Coastal Zone Management Appellate Panel.<sup>38</sup> The court found "no compelling reason to overrule the panel's decision" that Park Island was not a small island and that the transportation regulations applied to

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29. *S.C. Coastal Conservation League*, 363 S.C. at 71–72, 610 S.E.2d at 484.

30. *Id.* at 72, 610 S.E.2d at 484.

31. *Id.*

32. *Id.*

33. *Id.* at 72, 610 S.E.2d at 485.

34. *Id.* at 75, 610 S.E.2d at 486.

35. *Id.*

36. *Id.* at 74–75, 610 S.E.2d at 486.

37. *Id.* at 75, 610 S.E.2d at 486 (citing *Brown v. S.C. State Dep't of Health and Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); *Byerly Hosp. v. Health and Human Serv. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995)).

38. *Id.*

LandTech's permit application.<sup>39</sup> LandTech began construction of the bridge on August 1, 2005.<sup>40</sup>

### III. THE REGULATIONS

The Coastal Zone Management Act (CZMA) is the enabling legislation that gives DHEC, and thus OCRM, authority to regulate development of the South Carolina coast.<sup>41</sup> The purpose of the CZMA "is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and all of the people of the State."<sup>42</sup> The CZMA requires that any person desiring to erect a structure within a critical area must first obtain a permit from DHEC.<sup>43</sup> The state can require a permit for bridge construction over tidelands because, based on the public trust doctrine, the state holds presumptive title to all land below the mean high tide line.<sup>44</sup> Therefore, any party desiring to build a private bridge to an island must obtain the state's permission because, absent a showing otherwise,<sup>45</sup> the state owns title, for the benefit of the public, to the land through or over which the bridge must be built.<sup>46</sup>

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39. *Id.* The court held that the Coastal Conservation League never raised the issue of whether the permit met the less stringent transportation regulations in the lower courts but only argued that the small island regulations should apply to the Park Island permitting process. *Id.* at 76, 610 S.E.2d at 487. The law of the case, therefore, was that the permit complied with the transportation regulations. *Id.* The court noted, however, that if it had reached the question of whether the permit comported to the transportation regulations, substantial evidence existed to support the appellate panel's finding that LandTech met the permit requirements. *Id.*

40. See <http://www.landtechsc.com/parkisland.php> (last visited Mar. 13, 2007). This website indicates that the construction of the bridge is complete. *Id.*

41. S.C. CODE ANN. § 48-39-50 (1987 & Supp. 2006).

42. S.C. CODE ANN. § 48-39-30(A) (1987 & Supp. 2006); see also S.C. CODE ANN. § 48-39-10(B) (1987 & Supp. 2006) (naming Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper counties as comprising the coastal zone).

43. S.C. CODE ANN. § 48-39-130(C) (2003); see also S.C. CODE ANN. § 48-39-10 (2003) (defining critical area as either coastal waters, tidelands, beaches, or certain beach/dune areas).

44. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003); *State v. Yelsen Land Co.*, 265 S.C. 78, 81, 216 S.E.2d 876, 878 (1975) (applying the public trust doctrine to tidelands); Kenneth R. Moss, *The Public Trust Doctrine in South Carolina*, 7 S.C. ENVTL. L.J. 31 (1998); see also 2003 S.C. Op. Att'y Gen., 2003 WL 22970990 (Dec. 5, 2003) (stating that the state holds presumptive title to marsh islands even though they are above the mean high tide line).

45. A property owner can overcome the presumptive title held by the state with a showing of clear title granted from the sovereign—a King's Grant or Legislative Grant—which is strictly construed against the grantee. *McQueen*, 354 S.C. at 149 n.6, 580 S.E.2d at 119 n.6 (citing *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979)).

46. See *McQueen*, 354 S.C. at 149, 580 S.E.2d at 119; *State v. Hardee*, 259 S.C. 535, 543, 193 S.E.2d 497, 501 (1972); *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 529, 59 S.E.2d 132, 144 (1950), overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 246–47, 329 S.E.2d 741, 742–43 (1985) (abolishing the doctrine of sovereign immunity and overruling all cases in which the court upheld the doctrine); *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884).

### A. *The Old Small Island Regulations*

OCRM promulgated the small island regulations<sup>47</sup> and the general transportation regulations<sup>48</sup> for building permits in coastal and tidewater areas. Based on the values set forth in the CZMA,<sup>49</sup> the purpose of the small island regulations was to protect critical areas, which included tidelands,<sup>50</sup> by developing more stringent criteria for building bridges to small marsh islands.<sup>51</sup> The first step in determining whether to grant a bridge permit was for OCRM to determine if the small island regulations or the general transportation regulations applied to the island for which the applicant sought a bridge permit.<sup>52</sup> If OCRM determined that the small island regulations were applicable, the agency then used the eleven factors outlined in the regulation to determine whether it was appropriate to grant the permit for constructing the bridge.<sup>53</sup> The factors included size of the island, public need, impact to potential resources, existence of feasible alternatives, and the distance, type, and dimensions of bridging required.<sup>54</sup> OCRM, therefore, weighed a number of social, economic, and environmental factors and competing interests in determining whether bridging to a small island was appropriate.

### B. *The New Coastal Island Regulations*

The new coastal island regulations, promulgated by OCRM to replace the old small island regulations, apply to “applications for permits for bridges and docks as a means of obtaining access to coastal islands.”<sup>55</sup> The intent of the regulations is to protect “important habitats and resources associated with islands”<sup>56</sup> from damage caused by “the placement of structures into critical area coastal tidelands and waters.”<sup>57</sup> The new coastal island regulations identify “[c]onstruction of bridges within critical area tidelands and water” as causing “temporary damage to salt marsh and shellfish beds, temporary increased turbidity, permanent displacement of marshes by installation of pilings, and permanent shading of marsh.”<sup>58</sup>

47. S.C. CODE ANN. REGS. 30-12(N) (Supp. 2004), *invalidated by* S.C. Coastal Conservation League v. S.C. Dep’t of Health and Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005).

48. S.C. CODE ANN. REGS. 30-12(J) (Supp. 2004).

49. S.C. CODE ANN. §§ 48-39-20(E), -30 (1987 & Supp. 2006).

50. S.C. CODE ANN. § 48-39-10(J) (1987 & Supp. 2006).

51. S.C. CODE ANN. REGS. 30-12(N) (Supp. 2004).

52. *S.C. Coastal Conservation League*, 363 S.C. at 74, 610 S.E.2d at 486.

53. *Id.*

54. S.C. CODE ANN. REGS. 30-12(N) (Supp. 2004).

55. S.C. CODE ANN. REGS. 30-12(N) (Supp. 2006).

56. *Id.* 30-12(N)(1)(a).

57. *Id.* 30-12(N)(1)(b).

58. *Id.* 30-12(N)(1)(c).

One major difference between the two sets of regulations is that the new coastal island regulations define when an island is eligible for a bridge permit.<sup>59</sup> Under the old small island regulations, OCRM reviewed each permit application by weighing the eleven factors listed in the regulation. In contrast, the new coastal island regulations clearly define which islands are eligible for a permit. The new coastal island regulations prohibit OCRM from considering any application for a bridge construction permit to access an island less than two acres in size<sup>60</sup> unless the island is larger than one acre and no more than one hundred feet from the upland.<sup>61</sup> For islands two acres or larger, the maximum allowed bridge length correlates to the island's size—the larger the island, the longer the maximum allowable length of the bridge.<sup>62</sup> The coastal island regulations limit the maximum length of any bridge to 1,500 feet.<sup>63</sup> As a result, any coastal island greater than 1,500 feet from the upland is ineligible for a bridge construction permit.<sup>64</sup> Islands one acre or larger that are otherwise ineligible for a permit<sup>65</sup> may qualify for a special exception that requires "clear and convincing evidence that [the bridge] will create overriding public benefits resulting from mitigation and diminished impacts to public trust resources compared with development that would likely occur without the bridge."<sup>66</sup>

At the time the new coastal island regulations were enacted, they covered 2,409 islands without bridges in South Carolina.<sup>67</sup> Under the new regulations, only 186, or 7.7%, of undeveloped islands are eligible for bridge permits.<sup>68</sup> This number is a drastic reduction; under the old small island regulations every island was subject to potential bridging and development.<sup>69</sup>

59. *Id.* 30-12(N)(2).

60. *Id.* 30-12(N)(2)(c).

61. *Id.* 30-12(N)(2)(e). The regulations define upland as the naturally occurring mainland. *Id.* 30-12(N)(2)(f)(i)(a). For the purposes of this regulation, the following islands are also considered uplands: Waites Island, Pawleys Island, Isle of Palms, Sullivan's Island, Folly Island, Kiawah Island, Seabrook Island, Edisto Island, Johns Island, James Island, Woodville Island, Slann Island, Wadmalaw Island, Daniel Island, Edisto Beach, Harbor Island, Hunting Island, Fripp Island, Hilton Head Island, St. Helena Island, Port Royal Island, Ladies Island, Spring Island, and Parris Island. *Id.* 30-12(N)(2)(f)(i)(b).

62. *Id.* 30-12(N)(2)(d)(i)–(ii).

63. *Id.* 30-12(N)(2)(d)(ii)(b).

64. *Id.*

65. In addition to the islands that fail the regulatory criteria for eligibility, islands within the ACE Basin Task Force Boundary Area, the North Inlet National Estuarine Research Reserve, and the Cape Romain National Wildlife Refuge are not eligible to apply for a bridge permit. *Id.* 30-12(N)(2)(b). However, OCRM can issue permits in these areas under a strict exception. *Id.* 30-12(N)(2)(b).

66. *Id.* 30-12(N)(10).

67. Office Of Coastal Res. Mgmt., S.C. Dep't of Health & Envtl. Control, Coastal Island Size and Distance Matrix (on file with the OCRM-Charleston Office).

68. *Id.*

69. *Id.* Another striking difference between the two regulations is that the new coastal island regulations can compel the dedication of a conservation easement on an island to reduce any environmental impact caused by the construction of a bridge. S.C. CODE ANN. REGS. 30-12(N)(4) (Supp. 2006). For a discussion of conservation easements in South Carolina, see Legislative Note, *South Carolina Solid Waste Policy and Management Act of 1991*, 1 S.C. ENVTL. L.J. 62, 69 (1991).



#### IV. SOUTH CAROLINA'S CURRENT STANDARD OF REVIEW AND THE HARD LOOK DOCTRINE

##### A. *The Current Standard of Review for Administrative Decisions in South Carolina*

South Carolina courts use a deferential approach when reviewing administrative rulemaking. The South Carolina Supreme Court has held that “[a]n administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation”<sup>70</sup> and does not exceed the agency’s authority.<sup>71</sup> In assessing the validity of legislative enactments, South Carolina courts afford legislative enactments great deference.<sup>72</sup> Under this standard of review, a legislative enactment is valid so long as it “bears a reasonable relationship to a legitimate state interest.”<sup>73</sup> Therefore, the standards of review for administrative regulations and legislative enactments are virtually identical.

The court, however, should not afford administrative rulemaking the same deference afforded to legislative enactments. Courts should afford legislative enactments great deference because they are the result of a democratically elected body charged with making decisions that affect the public health, safety, and welfare.<sup>74</sup> Administrative decisions deserve less deference than legislative

70. *Hunter & Walden Co. v. S.C. State Licensing Bd. for Contractors*, 272 S.C. 211, 213, 251 S.E.2d 186, 186–87 (1978) (citing *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (upholding a regulation requiring a contractor to demonstrate \$50,000 net worth for licensure as reasonably related to the statutory provision requiring contractors to submit a financial statement for licensure)); *see also* *McNickel’s, Inc. v. S.C. Dept. of Revenue*, 331 S.C. 629, 634–35, 503 S.E.2d 723, 725–26 (1998) (upholding a video poker regulation requiring employee presence for an entity to comply with the statutory limitation on the number of machines in a single place because the regulation was reasonably related to the determination of whether conjoined, but separate businesses constituted separate places); *U.S. Outdoor Adver., Inc. v. S.C. Dep’t of Transp.*, 324 S.C. 1, 3, 481 S.E.2d 112, 113–14 (1997) (upholding a highway advertising regulation requiring a business to be “readily recognized” as a business and not simply “visible” as specified by statute because the regulation was reasonably related to the purpose of the statute and the legislature specifically authorized the agency to specify a more restrictive definition); *Anco, Inc. v. State Health & Human Servs. Fin. Comm’n*, 300 S.C. 432, 443, 388 S.E.2d 780, 787 (1989) (upholding a Medicaid policy that reduced reimbursement of lease costs to providers because the policy was rationally related to a legitimate government purpose in that the reduction in reimbursement allowed more money for patient services); *Milliken & Co. v. S.C. Dept. of Labor, Div. of Occupational Safety & Health*, 275 S.C. 264, 267, 269 S.E.2d 763, 764 (1980) (invalidating an administrative rule that permitted post-citation discovery where the authorizing statute contemplated the completion of fact-finding prior to the issuance of a citation).

71. *Milliken*, 275 S.C. at 268, 269 S.E.2d at 765 (invalidating the decision of the Commissioner of Labor to promulgate a rule allowing for post-citation discovery because the authorizing statute did not allow for such a regulation).

72. *See* *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 284 S.C. 81, 93–94, 326 S.E.2d 395, 402 (1985) (quoting *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 235–37, 246 S.E.2d 869, 877–78 (1978)).

73. *Id.*

74. *See* *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993) (applying rational basis review and stating that “even improvident decisions will eventually be rectified by the democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political

enactments because agency decisions emanate from an unelected group that is not as directly accountable to the public.<sup>75</sup> South Carolina courts, therefore, should abandon the current deferential standard and should undertake a more aggressive judicial review of administrative regulations by applying the hard look doctrine.

### *B. An Overview of the Hard Look Doctrine*

The purpose of the hard look doctrine is to ensure that agencies engage in reasoned decision-making by gathering the necessary information.<sup>76</sup> While courts using the hard look doctrine still give some deference to agency decisions, to determine if the rulemaking is supported by the appropriate amount of evidence, courts also delve into the facts and evidence established in the record on which the agency relied in making its decision.<sup>77</sup> Under a traditional rational basis review, "legislation is presumed to be valid and will be sustained . . . if rationally related to a legitimate state interest."<sup>78</sup> The court gives such wide deference to the legislature because it presumes that "even improvident decisions will eventually be rectified by the democratic process."<sup>79</sup> Under the hard look doctrine, the court is essentially giving rational basis more teeth by not accepting an agency finding at face value.<sup>80</sup> In determining whether an agency's decision was arbitrary, capricious, or an abuse of discretion, a court applying

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branch has acted.") (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

75. Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 443 (2006) (arguing that independent agencies should be afforded less deference than executive branch agencies because of their limited political accountability). Under South Carolina law, the General Assembly must approve administrative regulations. S.C. CODE ANN. § 1-23-120 (2005). Considerable differences exist, however, in how the General Assembly enacts statutes compared to how it approves regulations. When enacting a statute, the General Assembly studies and debates the provision in a way that is open and amenable to public scrutiny. Furthermore, state legislators are directly accountable to their constituents for their legislative actions. In contrast, agency staff often studies and debates regulations outside the view of the general public and is not held directly accountable to the public.

76. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS § 15.04, at 295 (1983 & Supp. 2006) (citing James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 354 (1979); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974)).

77. *Id.*

78. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted).

79. *Id.*

80. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (noting that findings of Congress are due more deference than findings of administrative agencies because Congress is "far better equipped than the judiciary to amass and evaluate the vast amounts of data" used to make legislative decisions) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665-66, 670 (1994) (plurality opinion)).

hard look review looks to the record established and used by the agency to make its decision.<sup>81</sup>

The hard look doctrine traces its roots to decisions from the United States Court of Appeals for the D.C. Circuit.<sup>82</sup> In the first phase of the development of the doctrine, courts used it to assess whether an agency had gathered sufficient information upon which to make an informed decision.<sup>83</sup> In the second phase of the development of the doctrine, courts began to “*carefully scrutinize* agency decisions with the same hard look focus.”<sup>84</sup> Courts extended the hard look doctrine beyond requiring that agencies take a hard look at available information to avoid arbitrary and capricious decisions but now look at how agencies used that information to make decisions.<sup>85</sup> Under the current doctrine, therefore, an agency cannot simply show it took a hard look at all of the relevant information but must also show it used the relevant information in developing its position.

The hard look doctrine quickly spread from the D.C. Circuit to other federal circuits.<sup>86</sup> The Supreme Court used the notion of a hard look at agency decision-making in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>87</sup> In *Volpe*, the Court held that a district court may conduct a searching inquiry to determine if substantial evidence supported an agency decision.<sup>88</sup> The Court noted that, while the agency is due deference in its decision, the court must determine that the agency decision “was not ‘arbitrary, capricious, or an abuse of discretion.’”<sup>89</sup> In

81. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); O’RIELLY, *supra* note 76, at 295–96 n.3; see, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (“If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency’s path may reasonably be discerned, though of course the court must not be left to guess as to the agency’s findings or reasons.” (footnote omitted)). The hard look doctrine is well-suited for assessing agency decisions in the context of environmental rulemaking because of the amount of scientific information involved. See Leventhal, *supra* note 76, at 511–12.

82. O’RIELLY, *supra* note 76, at 296 (citations omitted).

83. *Id.*; see, e.g., *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969) (refusing to remand for further fact finding after being “satisfied that the Commission gave petitioners’ predictions a hard look”); *Greater Boston Television Corp.*, 444 F.2d at 851 (requiring that an “agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts” and stating that “[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues” (citations omitted)).

84. O’RIELLY, *supra* note 76, at 296 (citing *Md.-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029, 1037–38 (D.C. Cir. 1973)).

85. *Id.*; see *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) (requiring that EPA use data in such a way as to result in reasoned decision-making).

86. O’RIELLY, *supra* note 76, at 297 (citing *Adler v. Lewis*, 675 F.2d 1085, 1098 (9th Cir. 1982); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 220 (1st Cir. 1981); *Benmar Transp. & Leasing Corp. v. ICC*, 623 F.2d 740, 745 (2d Cir. 1980); *Nat’l Indus. Sand Ass’n v. Marshall*, 601 F.2d 689, 699 (3d Cir. 1979); *Aqua Slide ‘N’ Dive Corp. v. Consumer Prod. Safety Comm’n*, 569 F.2d 831, 844 (5th Cir. 1978); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1063 (8th Cir. 1978)).

87. 401 U.S. 402 (1971).

88. *Id.* at 415.

89. *Id.* at 416 (quoting Administrative Procedure Act, 5 U.S.C. § 706 (1964 ed., Supp. V)). The Supreme Court also used the hard look doctrine, albeit without calling it such, in *Motor Vehicle Manufacturers Ass’n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S.

making this determination, the court looks to see if the agency based its decision “on a consideration of the relevant factors and whether there has been a clear error in judgment.”<sup>90</sup> For example, an agency rule that “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise” would fail judicial review under the hard look doctrine.<sup>91</sup>

A number of state courts also apply some version of the hard look doctrine to agency decisions. For example, when reviewing agency decisions, Alaska courts examine whether “the agency has taken a “hard look” at the salient problems and has “genuinely engaged in reasoned decision making.””<sup>92</sup> In addition, courts in New Jersey require that the administrative “record contains substantial evidence to support” the agency’s findings.<sup>93</sup> In New Jersey, a party can successfully challenge a regulation by showing that “the agency clearly erred in reaching a conclusion that could not have reasonably been made based on relevant factors.”<sup>94</sup> Also, Washington courts find that an “agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.”<sup>95</sup> Therefore, while not invoking the hard look doctrine by name, some state courts use a form of hard look review when determining the validity of state regulations.

There are many benefits to a court system that applies the hard look doctrine to agency rulemaking and decisions.<sup>96</sup> The greatest benefit of the hard look doctrine is that aggressive judicial review results in rules and actions that are the result of reasoned decision-making by the agency.<sup>97</sup> Agencies sometimes allow their choices to be “essentially dictated by professional values rather than science and without consideration of alternatives that reflect different values.”<sup>98</sup> The threat of aggressive judicial review can not only correct past unsubstantiated

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29, 42 (1983). In *Motor Vehicle*, the Court held that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change.” *Id.* at 42. Furthermore, this standard applied whether the agency was rescinding its earlier position or acting in the first instance. *Id.* at 41.

90. *Volpe*, 401 U.S. at 416 (citation omitted).

91. *Motor Vehicle*, 463 U.S. at 43.

92. *Mech. Contractors of Alaska, Inc. v. State Dep’t of Pub. Safety*, 91 P.3d 240, 247 (Alaska 2004) (quoting *Stepovak-Shumagin Set Net Ass’n v. State Bd. of Fisheries*, 886 P.2d 632, 637 (Alaska 1994)).

93. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 11 (N.J. Super. Ct. App. Div. 2004) (citing *George Harms Constr. Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 86 (N.J. 1994)).

94. *Id.*

95. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 64 P.3d 606, 615 (Wash. 2003) (citing *Rios v. Wash. Dep’t of Labor & Indus.*, 39 P.3d 961, 970 (Wash. 2002)).

96. See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522 (1989).

97. Mark Seidenfeld, Reply, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559, 563–65 (1997) [hereinafter Seidenfeld, *Hard Look Review*].

98. *Id.* at 564.

decision-making by an agency but may also force agencies to “consider[] whether alternative decisionmaking criteria might be appropriate.”<sup>99</sup> The hard look doctrine places pressure on an agency to gather the necessary information before making a decision because failure to do so subjects the agency decision to possible invalidation by the courts.<sup>100</sup> The hard look doctrine, therefore, can lead to an increase in reasoned decision-making by placing judicial pressure on an agency to provide data to support its reasoning.

Another important benefit of the hard look doctrine is that it protects our notion of separation of powers by providing a substantial and important check on arbitrary agency action.<sup>101</sup> As the power of the “Fourth Branch” of government continues to grow, it is important for courts to exercise their constitutional duty as a check on arbitrary executive and legislative power.<sup>102</sup> Complicated political situations now existing in state legislatures give rise to broad grants of administrative power.<sup>103</sup> Aggressive judicial review is necessary to provide a check on possibly arbitrary agency decisions that may adversely impact the community.<sup>104</sup> The hard look doctrine, therefore, can serve as a check on the burgeoning power of the administrative state.

The hard look doctrine also serves to advance the perceived legality and legitimacy of an agency decision.<sup>105</sup> The improvement in the “quality of both the actual review and the perceived fairness of the appellate process”<sup>106</sup> leads the public to view the agency action as a legitimate exercise of the administrative state.<sup>107</sup> Without the perception of legality and legitimacy of an agency decision, the administrative state loses the credibility it needs to function appropriately. By subjecting agency decisions to aggressive judicial review, the hard look doctrine provides the necessary credibility for the administrative state.

Finally, the hard look doctrine defends the interest and participation of the general public in the decision-making process.<sup>108</sup> Scholars have viewed the hard look doctrine as a “protector of increased citizen participation and deliberative

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99. *Id.* at 565.

100. Sunstein, *supra* note 96, at 525.

101. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489–90 (1997) [hereinafter Seidenfeld, *Deossification*]; see William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 403–04 (2000).

102. See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 425 (1987).

103. See Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 619–20 (1997).

104. See *id.* at 642–43.

105. See Sunstein, *supra* note 96, at 523, 525–526.

106. O'REILLY, *supra* note 76, at 297.

107. See Sunstein, *supra* note 96, at 525.

108. See Jordan, *supra* note 101, at 404.

government."<sup>109</sup> The notice-and-comment rulemaking procedure that agencies often use today relies on input from non-agency participants.<sup>110</sup> The problem of agency capture<sup>111</sup> can result from the disproportionate influence of special interest groups over agency decision-making.<sup>112</sup> It is no surprise that organized private interest groups have the resources to protect and advance their interests, often at the expense of parties who lack the resources to effectively organize and advance their position.<sup>113</sup> The hard look doctrine protects the interests of non-organized interested parties by requiring that an agency base its decision on all relevant information.<sup>114</sup>

Despite its many benefits, critics of the hard look doctrine point to some counterbalancing drawbacks.<sup>115</sup> In applying the doctrine, courts must conduct a searching review of the administrative decision-making process. This aggressive judicial review results in the court utilizing scarce judicial resources that it may not otherwise consume through applying other methods of review.<sup>116</sup> Given the benefits provided by aggressive judicial review, however, the additional judicial resources expended by hard look review are well spent.

Another criticism of the hard look doctrine is that it can result in agency freeze by creating uncertainty about whether a court would find the agency determination is the result of reasoned decision-making.<sup>117</sup> Agency freeze results from three types of uncertainty created by aggressive judicial review.<sup>118</sup> First, the court's lack of understanding of the intricacies involved in setting highly technical standards results in the court placing an emphasis on fairness to the parties rather than on a long lasting and feasible solution to the problem faced by the agency.<sup>119</sup> Unlike agency professionals, judges are not trained in specialized technical fields and tend to view the decision-making process from the perspective of legal experts.<sup>120</sup> The result is that courts focus on possible agency

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109. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 768 (1994).

110. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 182–89 (1997) (discussing the various benefits gained from mass participation in agency rulemaking).

111. For further discussion of agency capture, see generally PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981) (detailing pressures on regulatory agencies to adopt pro-industry policies) and KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986) (showing how interest groups are designed to influence public policy).

112. See Sunstein, *supra* note 96, at 525.

113. See *id.* at 184.

114. Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 528 n.313 (2003).

115. See Thomas O. McGarity, *Response, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 529–30 (1997).

116. See O'REILLY, *supra* note 76, at 297.

117. See Seidenfeld, *Hard Look Review*, *supra* note 97, at 492–99.

118. *Id.* at 492.

119. *Id.* at 492–93 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388 (1986)).

120. *Id.* at 493.

abuses of power rather than the technical difficulties of solving a particular problem.<sup>121</sup> This results in agencies employing professionals from a broad range of fields and spending additional time crafting rules that will hold up against aggressive judicial review.<sup>122</sup>

A second uncertainty introduced by the hard look doctrine results from the requirement that an agency assess all relevant factors before making a decision.<sup>123</sup> Courts have not articulated a standard that adequately guides an agency in determining whether a factor is important enough to warrant attention.<sup>124</sup> This results in ancillary issues either slowing down the agency decision-making process or causing agencies to shy away from issuing regulations.<sup>125</sup>

A third uncertainty created by aggressive judicial scrutiny is how hard an agency may be required to look at the relevant issues.<sup>126</sup> The lack of any objective criteria for agency analysis often results in agencies “performing costly and time-consuming studies to support their rules.”<sup>127</sup> Also, an agency may elect not to engage in rulemaking if gathering sufficient supporting information would be too expensive or time consuming.<sup>128</sup>

These potential costs of aggressive judicial review, however, do not outweigh the benefits gained from having administrative agencies engage in reasoned decision-making. The added expertise of additional professionals providing input during the rulemaking process should result in the agency crafting a better rule.<sup>129</sup> Furthermore, if an agency gathers more data concerning an issue, it could lead to a more reasoned decision. While there is a tipping point past which the agency only receives diminished returns, there is no evidence that applying the hard look doctrine passes that point.<sup>130</sup> Weighing both the benefits and the costs, “[j]udicial review under the hard look doctrine is the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies.”<sup>131</sup>

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121. *Id.*

122. *See id.* at 493–94.

123. *Id.* at 496–97.

124. *Id.* at 497.

125. *Id.*

126. *Id.* at 498.

127. *Id.* at 499.

128. *Id.*

129. *Id.* at 493–94.

130. *See Jordan, supra* note 101, at 445 (noting that research into the costs and benefits of the hard look doctrine reveals that agencies are “generally able to achieve their regulatory goals, usually with no significant judicial interference”); Sunstein, *supra* note 101, at 537 (observing that aggressive judicial review aids in producing agency rules “that have saved lives or otherwise accomplished considerable good”); *cf. Seidenfeld, Deossification, supra* note 89, at 523–24 (concluding that, while the hard look doctrine does create uncertainty in agency rulemaking, a more deferential view would not clear up this uncertainty).

131. *Jordan, supra* note 101, at 444.

## V. TAKING A HARD LOOK AT THE NEW COASTAL ISLAND REGULATIONS

The new coastal island regulations illustrate the need for aggressive judicial review of administrative decisions in South Carolina. The regulations were the product of notice-and-comment rulemaking<sup>132</sup> and an agency-created advisory committee composed of interested parties representing a spectrum of interests.<sup>133</sup> In applying the hard look doctrine, the court should use a two-part analysis to determine if a rule is arbitrary, capricious, or an abuse of discretion. First, the court should question whether the agency gathered and considered all of the relevant information necessary to make a reasoned decision.<sup>134</sup> Once satisfied that an agency looked at all the relevant information, the court should then assess how the agency used that information.<sup>135</sup> In performing this part of the analysis, the court should consider whether the agency rule is reasonably connected to the relevant facts and if the agency articulated a “rational connection between the facts found and the choice made.”<sup>136</sup>

To analyze South Carolina’s new coastal island regulations, the court should focus on the actions of the advisory committee. DHEC charged the committee with drafting recommendations for access to coastal islands,<sup>137</sup> and the General Assembly, with some revisions, approved the advisory committee’s draft regulations.<sup>138</sup> The advisory committee, therefore, conducted a majority of the substantive rulemaking and was the body primarily responsible for researching and analyzing relevant information. As a result, when conducting hard look review, it is proper for the court to focus on the advisory committee’s actions.

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132. Notice-and-comment rulemaking occurs when an “agency publishes a proposed regulation and receives public comments on the regulation, after which the regulation can take effect without the necessity of a formal hearing on the record.” BLACK’S LAW DICTIONARY 1358 (8th ed. 2004). This type of rulemaking is “the most common procedure followed by an agency in issuing its substantive rules,” *Id.* Regulations proposed by South Carolina agencies do not require a formal hearing but only public notice and an opportunity for public comment. See S.C. CODE ANN. § 1-23-110 (2004). The advisory committee provided concerned citizens with notice of upcoming meetings and an opportunity for public comment. See, e.g., Minutes of Marsh Islands Advisory Committee Meeting (August 24, 2005) [hereinafter August 24 Minutes] (on file with the OCRM-Charleston Office).

133. The six member committee was composed of one representative each from the South Carolina Coastal Council, South Carolina Law Project, South Carolina Coastal Conservation League, Palmetto Bluff Conservancy, legal profession, and coastal real estate development industry. Minutes of Marsh Islands Advisory Committee Meeting 1 (July 13, 2005) [hereinafter July 13 Minutes] (on file with the OCRM-Charleston office).

134. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that, while the scope of review under an arbitrary and capricious standard is narrow, the agency must still “examine the relevant data”).

135. *Id.*

136. *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

137. Minutes of Marsh Islands Advisory Committee Meeting (July 27, 2005) [hereinafter July 27 Minutes] (on file with the OCRM-Charleston Office).

138. 30 S.C. Reg. 167, 167–73 (June 23, 2006).



*A. Whether the Advisory Committee Looked at All Relevant Information*

Under the hard look doctrine, the court should first inquire as to whether the advisory committee looked at all relevant information. Because the advisory committee chose to effectuate the purpose of the regulations (to protect critical areas from the adverse impacts of bridge construction<sup>139</sup>) by restricting eligibility for a bridge construction permit based on an island's size and distance from the mainland, examples of relevant information might include:

- 1) The adverse impact to critical areas caused by development of a bridged island;
- 2) The change in amount of adverse impact caused by development of critical areas based on the size of the island;
- 3) The change in amount of adverse impact caused by development of the critical area based on the distance of the island from the mainland;
- 4) The reduced adverse impact to the critical area for exempted islands;<sup>140</sup> and
- 5) The increased adverse impact to the critical area caused by development in prohibited areas.<sup>141</sup>

These considerations represent a cursory sketch of the type of information that would be relevant in creating regulations that restrict whether a bridge can be built to an island based on the island's size and distance from uplands.

The advisory committee, however, failed to investigate many important factors in crafting the new coastal island regulations. Instead, the committee focused on the possibility of creating a permitting system based on the size of an island and its distance from uplands.<sup>142</sup> At the advisory committee's initial meeting on July 13, 2005, OCRM reported the number and sizes of all marsh islands surrounded by critical areas.<sup>143</sup> Given that the committee focused on a tiered size and distance system, it is not hard to conclude that the next logical step for the committee would be to study the impacts of developing islands based on their size and distance from the mainland. The committee did look at a South Carolina Department of Natural Resources (SCDNR) report discussing the

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139. S.C. CODE ANN. REGS. 30-12(N)(1) (Supp. 2006).

140. Exempted islands are those that OCRM considers uplands for the purpose of bridging. S.C. CODE ANN. REGS. 30-12(N)(2)(f)(i)(b) (Supp. 2006).

141. Prohibited areas listed in S.C. CODE ANN. REGS. 30-12(N)(2)(b) (Supp. 2006) may only be bridged under the special exception in S.C. CODE ANN. REGS. 30-12(N)(10) (Supp. 2006).

142. See July 13 Minutes *supra* note 133.

143. *Id.* at 2 (The OCRM representative "provided data on the number and size of marsh islands in the critical area.").

negative impacts of coastal island development on critical areas.<sup>144</sup> However, the committee neither conducted nor utilized any study that specifically looked at protecting islands by prohibiting bridging based on size and distance from uplands; instead, the committee drew tiers based on how many islands would be excluded from permit eligibility.<sup>145</sup> The committee, however, continued to focus on size and distance limitations for bridge permitting. At the July 27, 2005 meeting, OCRM presented a matrix detailing all marsh islands' size and distance from the mainland.<sup>146</sup> The committee used the matrix to develop a tiered system based on the size of the island and its distance from the mainland.<sup>147</sup> This tiered system excluded from permit eligibility islands that the advisory committee considered too small for development based on their distance from the mainland.<sup>148</sup>

The advisory committee's minutes do not indicate that the committee discussed either alternatives to the tiered system or the impact of the tiered system on tidelands. The only substantive discussion concerning the tiered system recorded in the minutes involved checking the island size and distance matrix to determine how many islands would be eligible for bridging based on where the committee set the size and distance limitations.<sup>149</sup> The goal of the advisory committee appeared to be ensuring the protection of wetlands by restricting the number of islands eligible for a bridge permit.<sup>150</sup> Based on the

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144. *Id.* (referring to MARINE RES. DIV., S.C. DEP'T OF NATURAL RES., AN ECOLOGICAL CHARACTERIZATION OF COASTAL HAMMOCK ISLANDS IN SOUTH CAROLINA (2004) [hereinafter ECOLOGICAL CHARACTERIZATION REPORT], [http://www.csc.noaa.gov/id/DNR\\_Final\\_1\\_report\\_December.pdf](http://www.csc.noaa.gov/id/DNR_Final_1_report_December.pdf)).

145. See July 13 Minutes, *supra* note 133 (requesting additional information concerning islands' size and distance from the mainland); July 27 Minutes, *supra* note 137 (agreeing on size and distance correlation and requesting additional matrices to assist in developing the tiers); Minutes of Marsh Islands Advisory Committee Meeting (August 10, 2005) [hereinafter August 10 Minutes] (on file with the OCRM-Charleston office) (applying new matrices to tiered system and adjusting size and distance limitations); August 24 Minutes, *supra* note 132 (adding coastal islands to the matrix and adjusting limitations accordingly). It is possible that, based on the SCDNR report, the committee determined that any bridging in critical areas was unacceptable and drew the tiers solely to limit the number of islands eligible to apply for a permit. While a conclusion that all development was unacceptable might allow the committee to prohibit all bridging over critical areas, such a conclusion would not allow the committee to draw arbitrary lines leaving just enough areas eligible to sufficiently placate developers. If the committee determined that any bridging in a critical area is unacceptable, then exempting certain islands based on arbitrary distinctions is inappropriate.

146. July 27 Minutes, *supra* note 137.

147. *Id.*

148. *Id.* The committee also received information about how Florida and Georgia handle private access to marsh islands. *Id.*

149. See *supra* note 147 and accompanying text.

150. The committee did recommend a possible exception for islands one acre or larger that fail to qualify for a bridge permit under the tiered system. 30 S.C. Reg. 167, 177 (June 23, 2006). To qualify, the party requesting the exception must present "clear and convincing evidence that granting the bridge permit will serve an overriding public interest." *Id.* An application for an exception can meet the test for an overriding public interest only where the construction of the bridge results in "mitigation and diminished impacts to public trust resources compared with development that would likely occur without the bridge." *Id.*

committee's focus on the marsh island size and distance matrix rather than any empirical data concerning the impact of building bridges to islands of certain sizes and distances from the mainland, it is apparent that the advisory committee did not use scientific data to establish the tiered system.

In addition, the committee failed to consider any scientific information in establishing the prohibitions<sup>151</sup> and exceptions<sup>152</sup> contained in the new regulations. The committee investigated neither the need for increased protection nor the increased adverse impact of bridging in these areas relative to other coastal areas. The committee recommended that prohibited areas be subject to the same exception requirements as islands over one acre that are not eligible to apply for a permit.<sup>153</sup> Similarly, the committee recommended that, for the purposes of this regulation, OCRM consider certain islands as uplands, thus excluding them from the new coastal island regulations.<sup>154</sup>

The committee minutes, however, fail to provide a justification for why the new coastal island regulations should not apply to these islands. It seems that the committee failed to assess the impact to critical areas by excluding these islands from the regulations. It is conspicuous that the excepted islands represent areas where development activity is most prevalent<sup>155</sup> which raises the suspicion that the prohibitions and exceptions were the result of a political compromise between environmentalists and developers and not the result of reasoned decisionmaking.<sup>156</sup> By using such arbitrary distinctions, the committee evidently failed to consider all relevant information.<sup>157</sup>

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151. S.C. CODE ANN. REGS. 30-12(N)(2)(b) (Supp. 2006).

152. S.C. CODE ANN. REGS. 30-12(N)(2)(f)(i)(b) (Supp. 2006).

153. 30 S.C. Reg. 167, 174 (June 23, 2006).

154. *Id.* at 175.

155. The fact that the regulations treat the excepted islands as uplands is important because, when determining the distance of the island from uplands, smaller marsh islands can base their distance from these excepted islands rather than from true uplands. Thus, more islands are available for development that, absent the exceptions, would not be eligible to apply for a permit.

156. The Ninth Circuit remanded a U.S. Department of Commerce decision in *Midwater Trawlers Co-Operative v. Department of Commerce* regarding fish allocation for Indian tribes because the history leading up to the decision indicated that the agency's decision "was a product of pure political compromise, not reasoned scientific endeavor." 282 F.3d 710, 720–21 (9th Cir. 2002). In remanding the decision, the court charged the Department of Commerce to "promulgate a new allocation consistent with the law and based on the best available science, or to provide further justification for the current allocation." *Id.* at 721.

157. It should be noted that the committee met five times over two months. See July 13 Minutes, *supra* note 133; July 27 Minutes, *supra* note 137; August 10 Minutes, *supra* note 146; August 24 Minutes, *supra* note 132; Minutes of Marsh Island Advisory Committee Meeting (August 30, 2005) (on file at the OCRM-Charleston office) [hereinafter August 30 Minutes]. Given the short period of time in which the committee created its recommendations, it is not surprising that the committee was unable to gather all relevant information.

*B. How the Advisory Committee Used the Information It Gathered*

As a second step under the hard look doctrine, courts must assess how the agency used all the relevant information it gathered to arrive at its decision.<sup>158</sup> Under this analysis, the court looks to ascertain if the agency's determination is the result of reasoned, rather than arbitrary, decision-making. The new coastal island regulations would fail to meet this test. Again, the focus is on the tiered system recommended by the committee. At the July 13, 2005 committee meeting, SCDNR presented a report detailing the biological diversity of flora and fauna on a representative sample of marsh islands.<sup>159</sup> Based on the findings of the study, a representative from SCDNR concluded that "[i]slands should not be exempted from protection based upon size" and that "[s]ize alone should not be used to characterize the relative biological importance of marsh hammocks."<sup>160</sup> When the committee asked for SCDNR's recommendation, the agency asserted that "islands should be considered on a case-by-case basis" and that "an island ranking process" that took into account the environmental impacts of bridge construction to a specific island "was feasible."<sup>161</sup> In addition, during the public comment portion of the August 24, 2005 advisory committee meeting, the Coastal Conservation League expressed concerns over the potential environmental impacts of the tiered system.<sup>162</sup> The Coastal Conservation League stated that "no reason exists to move forward with regulations unless these regulations are an advance in the protection of the public trust resources" and recommended that the regulations consider islands individually rather than in a tiered system.<sup>163</sup> Based on the minutes of the committee meetings, it does not appear the committee seriously entertained either recommendation and continued to pursue the tiered system.<sup>164</sup> Furthermore, no party testified before the committee that distinctions based on island size and distance from the mainland would serve to protect critical areas. Based on the information considered by the committee, the advisory committee's creation of the tiered system appears arbitrary and capricious because it failed to use all of the relevant information to arrive at a reasoned decision.

Under a hard look review, a court should invalidate the new coastal island regulations. In applying the hard look doctrine, the court must assess first, whether the advisory committee gathered all relevant information and second,

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158. See *supra* notes 84–85 and accompanying text.

159. ECOLOGICAL CHARACTERIZATION REPORT, *supra* note 144, at 98–99.

160. *Id.* at 100.

161. July 13 Minutes, *supra* note 133. SCDNR, however, did state that the department currently lacked the manpower to undertake such a study. *Id.*

162. August 24 Minutes, *supra* note 132.

163. *Id.*

164. See July 13 Minutes, *supra* note 133 (continuing to create size and distance correlation but not discussing SCDNR recommendation that the islands be considered on a case-by-case basis); August 24 Minutes, *supra* note 132 (showing no discussion of SCCCL recommendation that OCRM consider islands individually).

whether the advisory committee based its decision on those relevant facts. The committee's failure to assess the impact of basing permit eligibility on an island's size and distance from uplands indicates that it failed to gather all relevant information.<sup>165</sup> Also, the committee pursued the tiered system despite testimony that islands should be considered on a case-by-case basis.<sup>166</sup> A court applying hard look review, therefore, should remand the regulations to allow DHEC and OCRM to redraft the regulations after gathering and considering the relevant information.

## VI. CONCLUSION

South Carolina courts should take the opportunity presented by the new coastal island regulations to adopt a hard look approach to evaluating agency decision-making. Although agencies exercise powers delegated by the legislature and the legislature approves regulations, at least in South Carolina, agency determinations ultimately are not the product of an elected legislature and should not be afforded the same amount of deference as legislative enactments.

In assessing the new coastal island regulations, the benefits of the hard look doctrine become apparent. By requiring the agency to establish that it both looked at and considered all relevant information, the hard look doctrine would ensure that the promulgated regulation was the result of reasoned, not arbitrary, decision-making. The benefit of reasoned decision-making, based on a comprehensive consideration of all relevant information, is a regulation that can actually achieve its purpose. In this case, the result would be regulations prohibiting bridging in situations where adverse environmental impacts to critical areas would result while also allowing development in areas where the impacts to critical areas would be minimized.

Furthermore, the check on OCRM preserves the system of checks and balances so fundamental to separation of powers by establishing the judiciary's role as a check and balance against the regulatory power of administrative agencies. The court would enhance the perceived legality and legitimacy of the regulation by ensuring it is not arbitrary. The current coastal island regulations may leave some members of the public wondering why they will be ineligible for a permit because their island is 1,501 feet from uplands while an island 1,499 feet from uplands is eligible. The regulations will seem to many as arbitrary and, therefore, illegitimate or illegal. By applying the hard look doctrine, the public will be reassured that the agency assessed all relevant factors, made its decision accordingly, and promulgated a regulation that is a valid exercise in administrative decision-making.

Finally, the court protects the interest of the public by engaging in aggressive judicial review. The notice-and-comment method of rulemaking is

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165. See *supra* Part V.A.

166. See *supra* notes 160–61 and accompanying text.

susceptible to capture by well-organized and funded private interest groups. By applying the hard look doctrine, the court would ensure that the agency has weighed the impacts to all parties and rationally decided who should bear the burdens of regulation or non-regulation. The benefit of heightened judicial review in this context is that it assures that the committee considered the interests of all interested parties and not just environmental groups and developers.

In finding that the new coastal island regulations fail hard look review, the appropriate remedy would be for the court to remand the case to allow DHEC and OCRM either to provide sufficient scientific evidence supporting the regulations or to redesign the regulations after gathering and assessing all relevant factors.

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